LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 3 1962
JOHN F. DAVIS, CLERK

No. 74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, and THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, PHILLIPS PETROLEUM CO., *Respondents*

On Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM OF LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, AND THE UNITED GAS IMPROVEMENT COMPANY

DAVID K. KADANE
EDWARD M. BARRETT
BERTRAM D. MOLL
250 Old Country Road
Mineola, New York
Attorneys for Long Island Lighting Company

MORGAN, LEWIS & BOCKIUS
Philadelphia-Washington
Of Counsel

VINCENT P. McDEVITT
SAMUEL GRAFF MILLER
HENRY P. SULLIVAN
1000 Chestnut Street
Philadelphia 5, Pennsylvania
Attorneys for Philadelphia Electric Company

J. DAVID MANN, JR.
WILLIAM W. ROSS
JOHN E. HOLTZINGER, JR.
1120 Connecticut Ave., N. W.
Washington 6, D. C.
Attorneys for The United Gas Improvement Company

May 3, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CASES CITED

Page

City of Detroit v. *F.P.C.*, 230 F. 2d 810 (D.C. Cir. 1955), *cert. den.* 352 U.S. 829 ..... 7, 8

Phillips Petroleum Company v. *Wisconsin*, 347 U.S. 672 (1954) 2, 3

STATUTES

Natural Gas Act, 52 Stat. 821 as amended

Section 4(e) 3, 7, 8, 9

Section 5 3

Section 5(a) 2, 3, 4, 5, 6, 7, 9

MISCELLANEOUS

F.P.C. 1961 Annual Report, p. 79 2

FPC Staff Report on 1960 Producer Sales, Oct. 1960 .. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 756

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, and THE UNITED GAS IMPROVEMENT COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, PHILLIPS PETROLEUM CO., *Respondents*

On Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY MEMORANDUM OF LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, AND THE UNITED GAS IMPROVEMENT COMPANY

This cause, as the court below recognizes (Pet. App. 2a), involves "major problems of general application." The decision below abets collection by producers for the indefinite future of countless millions of dollars in

rates which exceed area levels set by Respondent (R. 348) *without any possibility of refund*. It also indefinitely prolongs collection subject to refund of $168,000,000[1] annually, in rates almost all of which exceed existing area ceilings, and most of which may well not, for practical reasons, be actually recoverable by consumers (*infra*, p. 5).

Both Respondent[2] (R. 256-269) and the court below (Pet. App. 5a-10a) recognize that Respondent, in its opinion and order on remand from this Court's *Phillips* decision, has charted the future course of natural gas producer regulation. Respondent's brief in opposition to certiorari, in sharp contrast, now seeks to minimize the importance of the *Phillips* decision by treating it as merely a disposition of the particular rates of Phillips Petroleum Company for a limited period ending in 1959. Respondent has admitted, however, that in deciding to defer application of Section 5(a) of the Natural Gas Act to Phillips' existing and future rates, pending completion of area proceedings, it has at the same time decided similarly to defer application of Section 5(a) to the existing and future rates of other natural gas companies including those whose rate proceedings are virtually completed (Br. 13-14, 16); and its decision in this regard has been affirmed by the Court of Appeals.

This decision is before the Court for possible review. Petitioners seek review not to alter the main directions of the new regulatory policy, as Respondents

---

[1] FPC 1961 Annual Report, p. 79.

[2] Reference hereafter is to Respondent Federal Power Commission.

allege, but rather to assure effective *interim* protection for gas consumers.

1. Respondent (Br. 15) seeks to minimize the possibility of injury to the consuming public as a result of its decision to defer testing of existing rates pursuant to Section 5 of the Natural Gas Act pending completion of the area proceedings. Significantly, it does not discuss, much less answer, petitioners' main point, which is that *current* unregulated prices, which cannot be tested except prospectively under Section 5(a), can cause irreparable consumer loss pending the development of a viable regulatory method. Rather, focusing on *Phillips* alone, Respondent argues (Br. 18-19) that a substantial portion of the revenues collected under Phillips' existing rates is subject to retroactive adjustment pursuant to Section 4(e) of the Act and that, therefore, the Commission's refund powers provide adequate protection during the interim period.

Respondent's discussion (Br. 18-19) of Phillips' current refundable revenues is misleading. Phillips' current rates are not as Respondent seems to suggest (Br. 18-19) in the 14-cent to 11-cent range, but in many cases exceed 20 cents per Mcf. See Appendix B to petitioners' application for rehearing (R. 387-389). Further, Respondent's assertion that 82% of Phillips' current revenues are subject to refund would undoubtedly be disputed by Phillips, whose 1960 FPC Form 301 showed only 22.7% subject to refund. But whether the percentage is 82 or 22, Respondent's deferral of *current* rate regulation hardly constitutes "keeping Phillips' rates under control" (Respondent's Br., p. 16). With rare exceptions, the prices now being paid Phillips are exactly as they would have been had there been no "statement of general policy." Phillips, in the

years 1959 and thereafter, has made a substantial number of sales at prices in excess of 20 cents per Mcf which have been certificated by the Commission without provision for refund (R. 387-389). Thus, the fact that substantial volumes of Phillips' lower priced gas is sold under refundable rates is no substitute for the protection against these high priced sales which can be attained only under Section 5(a) of the Act. As Appendix B, *infra*, p. 13, demonstrates, only 9% of South Louisiana gas now flows at prices below 16 cents per Mcf.

Respondent's contentions also overlook the fact, as we shall show (*infra*, pp. 5-6), that the current and non-refundable revenues of producers generally have increased sharply since 1954.

Furthermore, Respondent has recently recognized, in contrast to its position here, in successfully seeking certiorari in the Court, that the bare existence of a theoretical power to refund is no substitute for expeditious and effective regulation of current prices.

> "The decision [for which review is sought] seems to rest largely on the erroneous view that consumers are fully protected, albeit they continue to pay excessive rates, by the pipeline's ultimate obligation to refund the excess charges with interest. But, as the Commission has recognized, the protection afforded by refund provisions is by no means complete. Ours is a mobile society; those consumers of natural gas who pay excessive rates in a given area today are scattered as the months go by. For the ordinary consumer, even if he does not move, a daily increase in his cost of living is not offset by the prospect of receiving a lump sum sometime in the future. The Court has encountered this problem in the cases dealing with the disposition of funds impounded as a result of

judicial stays of Commission rate reduction orders. Moreover, the inflationary impact of present day high rates is scarcely relieved by the possibility of refunds at an indeterminate date in the future." *F.P.C. v. Tennessee Gas Transmission Co., et al., cert. granted*, 30 U.S.L. Week 3229 (No. 591) Jan. 22, 1961, Petition of Federal Power Commission for Writ of Certiorari, pp. 10-11. [Footnotes and citations omitted]

Moreover, the Court will recognize that when contested prices are collected over a long period of time, the expectations of people making business decisions within the industry and of the investing public are bound to be influenced by the price being paid, even though there be a footnote—and the notation is all too often omitted—that the collection of such price is subject to dispute. More important, consumers are prejudiced in seeking to recover refunds by the sheer volume of the sums involved, and the inevitable cries of hardship which will arise if such large sums, collected over the greater part of a decade, must be surrendered with interest.

More important, Respondent's refund powers, even if effective, can reach only a part of the current sharply increased rates now being paid by consumers. Of the total 1960 revenues received by the 13 major producers whose Section 5(a) rate cases are near completion, roughly 83 per cent is now being collected not subject to any refund obligation (Appendix C, Wisconsin-New York Petition). A very substantial percentage of this non-refundable revenue is derived from sales and price levels in the 20 to 24 cent range which exceed the applicable Commission area price levels (R. 348), or which represent sharp increases over historical price levels in the particular area (see Appendix D, Wis-

consin-New York Petition). Such sharply increased prices are *prima facie* suspect and in all probability unlawful.

Taking South Louisiana as the most important example, 1960 jurisdictional sales by the foregoing 13 producers at prices in excess of 21.25 cents per Mcf (Respondent's current area "ceiling") aggregate approximately 436,000,000 Mcf, or 38 per cent, of total South Louisiana sales above this price level which amounted to 1,128,000,000 Mcf. Approximately 134,000,000 Mcf of this 436,000,000 Mcf (i.e., some 31 per cent) was sold at rates in excess of 21.25 cents per Mcf which are probably not subject to refund (Appendix A, *infra*, p. 12).[3] It should also be noted, as previously stated, that only 9 per cent of the *total* 1960 sales volume in South Louisiana was sold at prices less than 16 cents per Mcf, which is close to the Commission's current South Louisiana "old gas" ceiling of 15.75 cents (R. 348; Appendix B, *infra*, p. 13).

While it is impossible, of course, to compute the exact amount of total jurisdictional revenues which are probably being collected unlawfully and without possibility of refunds, there can be no doubt that the amounts are of enormous magnitude.

Thus, the Commission's deferral of regulation under Section 5(a), if permitted to continue, will result in a

[3] The condition of F.P.C. records make it impossible to do more than estimate the exact jurisdictional volumes being sold not subject to refund, since the only available data are derived from the pipeline "Form 2" reports which do not invariably segregate jurisdictional and intrastate sales. Hence, the foregoing figures (and those in Appendix A, *infra*, p. 12) may overstate the jurisdictional revenues not subject to refund, and must be taken as approximations. However, the actual volumes not subject to refund would be of the same order of magnitude.

significant and irretrievable increase in basic fuel costs borne by the ultimate consumer, wholly without consideration as to whether such an increase is consistent with the standards of the Natural Gas Act. Such an abdication of regulatory responsibility, unexplained and unjustified in Respondent's brief, warrants review by this Court.

2. Respondent (Br. 19-20) argues that there is no conflict of decision with *City of Detroit* and other cases holding that field prices alone cannot be used as a basis for testing "just and reasonable" rates, since Respondent does not intend to use the field prices embodied in its "new gas" SGP61-1 area price levels to set just and reasonable rates (Br. 20). The court below held, however (Pet. App. 17a), that the SGP61-1 initial or new gas rate levels could be treated as just and reasonable levels applicable to existing, not merely initial, rates pursuant to Sections 4 and 5(a) of the Act. This conclusion is not dictum, but a necessary premise for the court's holding that Respondent will be able to protect consumers under Section 5(a) simply by applying these SGP61-1 rate levels, without continuance or completion of individual company Section 5(a) cases. Thus, the court expressly relies on this conclusion in holding that Respondent did not abuse its discretion in failing to determine Phillips' just and reasonable current and future rates (Pet. App. 18a). Inasmuch as Respondent obviously cannot apply the SGP61-1 levels under Sections 4(e) and 5(a), absent hearing, unless those levels are just and reasonable, the opinion below is logically consistent only if interpreted as holding that the SGP61-1 levels are just and reasonable rates for each area in question.

Appendix D of the Wisconsin-New York Petition demonstrates that these rate levels are merely the highest previously certificated but untested price in each area, i.e., that they represent one limited version of the "fair field price" standard of regulation.[4] Thus, the holding that these levels are just and reasonable conflicts squarely with the *City of Detroit* decision and other Court of Appeals' decisions (discussed at pp. 17-20, Wisconsin-New York Petition) holding that unregulated field prices alone are not a sufficient basis for a Commission determination of justness and reasonableness under the Natural Gas Act. The conflict is clearly one between the circuits, despite Respondent's contrary suggestion (Br. 19, fn. 17). If the court below is correct in its conclusion, then the six decisions cited at p. 18 of the Wisconsin-New York Petition are wrong on this point. The conflict is inescapable, and is of major importance in federal regulation of the natural gas industry, and should be resolved by this Court.

3. Respondent (Br. 11-12) also misconceives the actual significance of its action in terminating Phillips' Section 4(e) proceedings applicable to rates in effect from 1955 through 1959 on the basis of Phillips' 1954 test year costs. Respondent (Br. 11) correctly points out that it found that the Section 4(e) increases were justified based on test year 1954 costs, since the increased rates fell short of making up Phillips' revenue deficiency during that year. What Respondent overlooks, however, is the fact that certain of these increased rate proceedings continued in effect through the year 1959 (Pet. App. 13a-14a); and, thus, in terminating all

[4] Respondent, while disputing (Br. 17, fn. 12) this assertion, makes no attempt to support its position by citation or factual references. See Appendix D, Wisconsin-New York Petition.

of the Section 4(e) proceedings and finding the Section 4(e) increases just and reasonable, the Commission was, in effect, sanctioning part of Phillips' 1959 rates on the basis of its 1954 costs. There is, of course, nothing in the record to show whether or not Phillips' unit revenues in 1959, which had increased 37 per cent over its 1954 unit revenues,[5] were just and reasonable, since the Commission had refused despite petitioners' request (R. 381) to obtain up-to-date 1959 costs.[6]

The Commission found (R. 325) that to fix Phillips' rates in 1960 on a record including only 1954 costs would be "a result without reason or justice." Petitioners heartily agree, adding only that the Commission's action in fixing Phillips' 1959 rates included in the consolidated Section 4(e) dockets on the basis of its 1954 costs is similarly "a result without reason or justice." Respondent's brief does not address itself to this point, presumably because it has no answer to it.

CONCLUSION

Petitioners do not, as Respondent claims (Br. 14-15), seek to force a particular regulatory method upon it. Petitioners support the "area approach" to producer regulation as a long-range solution to many of the problems of producer rate making. Petitioners do urge that there must be *interim* regulation based on Section 5(a) pending the success of the area proceed-

[5] 1954 data from Respondent's opinion; 1959 data from F.P.C. staff report on 1960 producer sales issued October, 1960.

[6] Respondent's discussion of the point is at R. 324-326, where it makes the crucial finding that the consolidated Section 4(e) rates "have produced revenues less than Phillips' cost of service during the periods they were in effect," (i.e., 1955-59). There is no evidence in the record supporting this finding, and Respondent cites none.

ings. As the dissent below recognizes (Pet. App. 20a-23a), the almost completed individual major producer cases offer the only practical means at present to achieve that interim regulation, and to carry out the policy of the Natural Gas Act.[7]

[7] While Respondent (Br. 13) recites the difficulty of an individual company approach to regulation, the Commission's Examiners have continued to decide major company cases at an accelerating rate, applying the method and principles employed by the Commission in its Opinion here. Without commenting on the Commission's "parade of difficulties" (R. 258-266), it should be evident that most of them refer to the problems of regulating small producers which are essentially small-scale explorers with great variations in costs and returns. However, there is nothing in the Natural Gas Act which compels the Commission to utilize the same method in regulating Phillips or other producers of comparable size and in regulating the approximately 6,000 small-scale gas explorers. As the dissenting judge herein points out (Pet. App. 21a, 23a), it is difficult for the Commission to argue that the individual company approach cannot be used as an interim device for controlling major producer rates, inasmuch as it has done exactly that in this case, as have its Examiners in a number of major company cases. Decision, *Tidewater Oil Co.*, Docket No. G-13310, *et al*, September 14, 1961; Decision *Hunt Oil Co.*, Docket No. G-9065, *et al.*, October 2, 1961; Decision, *Amerada Petroleum Co.*, Docket No. G-9385, *et al.*, April 9, 1962.

For these reasons, as well as those set forth in the petition in this case and in No. 754, this term, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID K. KADANE
EDWARD M. BARRETT
BERTRAM D. MOLL
250 Old Country Road,
Mineola, New York
Attorneys for Long Island Lighting Company

MORGAN, LEWIS & BOCKIUS
Philadelphia-Washington
Of Counsel

VINCENT P. MCDEVITT
SAMUEL GRAFF MILLER
HENRY P. SULLIVAN
1000 Chestnut Street
Philadelphia 5, Pennsylvania
Attorneys for Philadelphia Electric Company

J. DAVID MANN, JR.
WILLIAM W. ROSS
JOHN E. HOLTZINGER, JR.
1120 Connecticut Ave., N. W.
Washington 6, D. C.
Attorneys for The United Gas Improvement Company

APPENDIX A

1960 South Louisiana Jurisdictional Sales by 13 Producers at Prices Above 21.25 Cents

(Mcf at 15.025 Psia)

Producer	Total	Estimated Not Subject to Refund[1]
Amerada	4,024,376	99,837
Cities Service	6,661,308	1,042,637
Continental	82,402,402	2,921,393
Gulf	27,100,259	5,646,958
Hunt Oil	8,892,149	26,199
Ohio	7,071,256	0
Phillips	42,697,022	23,950,166
Shell	132,882,136	14,009,648
Sohio	11,926,080	978,865
Sun	34,002,685	18,549,843
Texaco	50,591,625	47,766,413
Tidewater	14,011,377	11,382,513
Union Producing	13,806,581	8,006,985
Total 13 Producers	436,069,256	134,381,457
Total All Producers	1,128,327,240	

Source: F.P.C. Form 2 Reports, Year ended December 31, 1960.

[1] Sales not subject to refund include certain sales which are not identified as to their interstate or intrastate nature; and rate schedules under which no actual collections were made subject to refund.

APPENDIX B

Distribution by Price Class of Average Prices Paid for Natural Gas by Interstate Pipelines in South Louisiana in 1960

Price Class	1960 Purchases Mcf (15.025 Psia)	Per Cent of Total
6.00- 6.99	2,221,736	0.11%
7.00- 7.99	666,642	0.03
8.00- 8.99	23,309,679	1.14
9.00- 9.99	38,811,248	1.90
10.00-10.99	35,714,274	1.75
11.00-11.99	40,272,392	1.97
12.00-12.99	2,677,253	0.13
13.00-13.99	495,768	0.02
14.00-14.99	2,670,530	0.13
15.00-15.99	37,982,695	1.86
16.00-16.99	5,263,682	0.26
17.00-17.99	42,823,701	2.09
18.00-18.99	180,441,826	8.83
19.00-19.99	158,926,371	7.77
20.00-20.99	252,391,713	12.35
21.00-21.99	337,183,253[1]	16.49
22.00-22.99	402,139,026	19.67
23.00-23.99	423,440,530	20.71
24.00-24.99	56,830,783	2.78
Total	2,044,263,102	100.00%
Average Price 20.57¢ Purchases Above 21.25¢	1,128,327,240	55.19%

Source: F.P.C. Form 2 Reports, Year ended December 31, 1960.

[1] 245,916,901 Mcf in this price class sold for more than 21.25 cents, the FPC "new gas" ceiling.